



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

July 18, 1996

Mr. John Riley
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR96-1173

Dear Mr. Riley:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40359.

The Texas Natural Resource Conservation Commission ("the TNRCC") received a request for all documents relating to Rhimco Industries, Inc. ("Rhimco") and/or Britton Processing. The requestor modified her request to eliminate pre-1991 documents that are irrelevant to the pending enforcement action against Rhimco. You claim that some of the requested information is excepted from disclosure under the informer's privilege, incorporated by section 552.101 of the Government Code, as well as sections 552.103, 552.107, 552.108, and 552.111 of the Government Code. You have submitted samples of the documents which the TNRCC claims are excepted from disclosure. We have considered the exceptions you claimed and have reviewed the sample documents.

You claim that some of the requested information is excepted from disclosure under the informer's privilege. Texas courts have recognized the informer's privilege. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). It protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority, provided that the subject of the information does not already know the informer's identity. Open Records Decision Nos. 515 (1988) at 3, 208 (1978) at 1-2. The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 (1981) at 2 (citing Wigmore, Evidence, § 2374, at 767 (McNaughton rev. ed. 1961)). The report must be of a violation

of a criminal or civil statute. *See* Open Records Decision Nos. 582 (1990) at 2, 515 (1988) at 4-5.

We have reviewed the highlighted information which the TNRCC claims is excepted under the informer's privilege and conclude that it does identify an informer who reported a potential violation of a criminal or civil statute. Therefore, the TNRCC may withhold from disclosure the highlighted information for which it has asserted the informer's privilege.¹ We assume for purposes of this ruling that the subject of the complaint does not know the informer's identity. *See* Open Records Decision Nos. 515 (1988), 208 (1978).

Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Section 552.111 also excepts from required public disclosure a preliminary draft of a letter or document related to policymaking matters, since drafts represent the advice, opinion, and recommendation of the drafter as to the form and content of the final document. Open Records Decision No. 559 (1990). We have marked one document that the TNRCC may withhold under section 552.111, as it is a draft document that relates to the policymaking processes of the agency. We note that the final version of this document has been released.

Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. We have marked the information that may be withheld under section 552.107(1). The remaining information may not be withheld under section 552.107(1).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The TNRCC has the burden

¹We note that we have marked one document as to the information protected by the informer's privilege because we disagree with TNRCC's marking of that document.

of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.-Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The TNRCC must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that there is an enforcement action pending against Rhimco, which action can only be resolved through settlement, administrative hearing, or trial. We have reviewed the documents for which the TNRCC has asserted section 552.103(a) as an exception and conclude that they are related to the pending enforcement action against Rhimco. Therefore, the TNRCC may withhold those documents under section 552.103(a). We note that when the opposing party in the litigation has seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

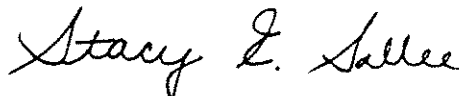
Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; see *Holmes v. Morales*, 39 Tex. Sup. Ct. J. 781, 1996 WL 325601 (June 14, 1996). Based on the information provided to this office, we conclude that the TNRCC's special investigation group is a law enforcement agency for the purposes of section 552.108. We therefore conclude that section 552.108 of the Government Code excepts the records for which the TNRCC has claimed an exception under section 552.108 from required public disclosure. On the other hand, you may choose to release all or part of the information that is not otherwise confidential by law. Gov't Code § 552.007.

In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

²We note that there is one document that was submitted to this office for review that was not marked. To the extent that the information contained in that document is not addressed by the ruling on the representative samples, we conclude that TNRCC has waived any discretionary exception to disclosure for that information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/ch

Ref.: ID# 40359

Enclosures: Marked documents

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(w/o enclosures)